

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE: . Case No. 01-1139 (JKF)
. .
W.R. GRACE & CO., .
et al., . USX Tower - 54th Floor
. 600 Grant Street
. Pittsburgh, PA 15219
Debtors. .
. March 31, 2008
. 8:44 a.m.
.

TRANSCRIPT OF TRIAL
BEFORE HONORABLE JUDITH K. FITZGERALD
UNITED STATES BANKRUPTCY COURT JUDGE

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1 THE COURT: This is the continuation of the personal
2 injury estimation trial in W.R. Grace, 01-1139. The
3 participants by phone are Shayne Spencer, Matt Doheny, James
4 O'Neill, Alex Mueller, Francis Monaco, Robert Guttman, James
5 Rieger, Theodore Tacconelli, James Wehner, Jeanna Rickards,
6 Elihu Inselbuch, but I see him here, Walter Slocombe, Leslie
7 Kelleher, Peter Lockwood, Matthew Russell, Ari Berman, Guy
8 Baron, Natalie Ramsey, Catherine Chen, Michael Lastowski, Seth
9 Brumby, Janet Baer, Daniel Silver, Matthew Daiker, Marti
10 Murray, John Phillips, Edward Westbrook, Debra Felder, Jason
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12 Theodore Freedman, Peter Shawn, Martin Dies, David Beane,
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14 Devine, Sung Choi, David Turetsky, Darrell Scott, Daniel
15 Speights, Beau Harbour, Bernard Bailor, Mark Hurford, Michael
16 Davis, Christina Kang, Terence Edwards, Andrew Craig, Kim
17 Christensen, Brian Mukherjee, John Ku, Andrew Chan, Jonathan
18 Brownstein, Scott Baena, Jay Sakalo, Lewis Kruger, and
19 Christopher Candon.

20 I'll take entries in court, please. Good morning.

21 MR. BERNICK: Good morning, David Bernick for Grace.

22 MR. HOROWITZ: Gregory Horowitz for the Equity
23 Committee.

24 MR. PASQUALE: Ken Pasquale for the Unsecured
25 Creditors Committee.

1 MR. FINCH: Nathan Finch for the Asbestos Claims
2 Committee.

3 MR. INSELBUCH: Elihu Inselbuch for the Asbestos
4 Creditors Committee.

5 MR. MULLADY: Raymond Mullady for the FCR.

6 MR. ANSBRO: Good morning, Your Honor, John Ansbro
7 for the FCR.

8 THE COURT: Wait. Sorry. Okay. Thank you. Good
9 morning.

10 MR. FRANKEL: Good morning, Your Honor, Roger Frankel
11 for the FCR.

12 THE COURT: Okay. Start with the arguments.

13 MR. BERNICK: Good morning, Your Honor. I think the
14 first order of business is the argument with respect to the
15 Rule 408 motion that was filed by the ACC and the FCR. So I
16 guess they'll be --

17 MR. INSELBUCH: Do you want me to go first?

18 MR. BERNICK: By all means.

19 (Pause)

20 THE COURT: Good morning.

21 MR. INSELBUCH: Good morning, Your Honor. Elihu
22 Inselbuch for the Asbestos Creditors Committee. As you are
23 aware the 408 issue has been the subject of motions in limine
24 that have been filed before Your Honor earlier. We made this
25 motion because in the course of Dr. Florence's testimony today

1 we anticipate that a 408 issue will come up. And we raise the
2 issue again now only to seek Your Honor's confirmation that
3 whatever your ruling will be with respect to 408 it will apply
4 equally to the witnesses that we present and the witnesses that
5 the debtor presents; as a matter of what's sauce for the goose
6 is sauce for the gander.

7 Now, to begin, I would ask that the Court remember
8 why we're here in the first place. This is not a contest where
9 we are trying to establish liability for any claim at all nor
10 for claims in the aggregate. This is an estimation in the aid
11 of plan confirmation in order to determine what amount of funds
12 needs to be set aside to fund a trust which by definition has
13 liabilities that can't be specifically determined, because
14 that's the language of the bankruptcy code.

15 In order to be fair not only to those claimants who
16 would come before that trust to seek compensation ultimately
17 for their claims, but also to all the other constituencies in
18 this bankruptcy, because if we were to over fund that trust we
19 would be taking the money from other constituencies. If we're
20 to under fund that trust we would be unfair to the claimants
21 who would have to come to receive their compensation from that
22 court -- from that trust.

23 And, in fact, as Your Honor said on December 5th,
24 2006 at Page 58, "It seems to me that the estimation is to do
25 two things. It's to try to figure out how many claims of a

1 particular type are currently pending, and to use that and
2 whatever other information the experts will use to extrapolate
3 out what the demands against the debtor will be in the future."
4 So it's to look at in absolute terms a number of claims that
5 are likely to be filed. And my eminent colleague said that's
6 correct. The Court went on to say, "Okay. Then it is to
7 figure out what the value of those claims is so that we know
8 what the debtor has to put into a fund in order to pay those
9 claims."

10 So I don't think that there's any real question that
11 the estimation is not here to determine liability. Now, Grace
12 in doing it's calculation of what that estimation should show
13 has put together a presentation which says what we must look at
14 -- what the Court should look at is the cases that were pending
15 and unresolved as of the date of the bankruptcy and look at
16 those and put them -- what we call, we Grace, call liability
17 filters and determine which of those claims would satisfy our
18 liability filters and then use that number of claims as
19 basically part of the formula from which they then would
20 develop how many claims there ultimately will be.

21 Interestingly enough once they do that they would
22 value all of the claims based upon value amounts, settlement
23 amounts that come from the settlement history. We on the other
24 hand, although you haven't seen the presentation as yet, but of
25 course Your Honor has been inundated, shall I say, with expert

1 reports and other materials telling you what this case will
2 ultimately show, do the calculation in a different way, in a
3 way that's been done in all the other cases where we have also
4 presented the need for estimating 524(g) trust values by
5 looking at the settlement history not to determine what the
6 liability was, because in fact in 98 percent of all the cases
7 or more this debtor never went to judgment. It resolved its
8 claims. It resolved its claims. In effect it bought its peace
9 from these claims. Some of them I'm sure it thought it had
10 good defenses. Some of it, it had lesser defenses to. But its
11 way of solving its problem was to resolve those claims for
12 money and make them go away.

13 Our concept of how we estimate the future, what would
14 have occurred had there not been a bankruptcy is to say we look
15 at what they did in the past, we make whatever adjustments need
16 to be made for changes in the system that we were in and then
17 we say this will be replicated going forward. And that's why
18 we look at these materials, and that's what they're for.

19 Now, when you estimate things normally you would look
20 to comparable things. The Court is familiar with estimation.
21 I mean, oftentimes you have to estimate the value of a plot of
22 real estate. Well, you look for a comparable piece of real
23 estate, look at what it sold for and then you would -- and if
24 you looked at a few comparables you satisfy yourself that
25 somewhere in that mix of values you'll have a fair estimate for

1 the property in question. .

2 When my kids were small we used to have a jar we put
3 coins in. And when the jar was full and we had to empty it out
4 and we had to go to the bank we would all guess how much money
5 would come out of this jar of coins. And, you know, after
6 awhile the guesses got pretty good. Because if you look at the
7 same jar and fill it with coins over time and if you remember
8 how many coins were in the jar you can come up with a pretty
9 good estimate. The problem we have here is we don't have
10 another Grace or something to look to, and I doubt very much
11 that the Court would accept evidence of what the estimates were
12 for other defendants in the tort system, because all of those
13 situations are different.

14 There is no comparable like that to look at. The
15 closest thing we can come to is what have they done prior to
16 the bankruptcy, and that's what we would propose to resolve.
17 Now, I would like to take a minute to look at the text of 408
18 with the Court. Could I have the ELMO? I'm not sure I know
19 how to work this either. Do I have to do something here?

20 UNIDENTIFIED SPEAKER: Power.

21 MR. INSELBUCH: Power. Did I do it?

22 UNIDENTIFIED SPEAKER: You did.

23 MR. INSELBUCH: Thank you. Now, how do I get --

24 UNIDENTIFIED SPEAKER: Minus.

25 MR. INSELBUCH: Minus? That is Rule 408. And what

1 does it talk about, Your Honor? It talks about compromise and
2 offers to compromise. And I think the words in this rule to
3 focus on for our purposes are first when does the rule operate?
4 It doesn't operate all the time. The evidence that it talks
5 about is not admissible when offered to prove liability for
6 invalidity of or amount of a claim. And what is the evidence
7 that you can't use? Basically showing that you offered money
8 to settle a claim or that you talked about offering to settle a
9 claim, but what claim is it? It's the claim. The claim.

10 And what was the purpose of the rule? The purpose of
11 the rule is to reflect the policy that our system would like
12 people to resolve their controversies and encourage them to
13 have settlement negotiations.

14 THE COURT: Could I send you to the back room and
15 lock you in until you settled this case?

16 MR. INSELBUCH: You've done it before.

17 THE COURT: I'd like to try it again.

18 MR. INSELBUCH: Well, could I finish my argument
19 first?

20 THE COURT: All right.

21 MR. INSELBUCH: And then send me with Mr. Bernick.

22 MR. BERNICK: No, wait a minute, just you.

23 MR. INSELBUCH: I'm not sure it would help if I went
24 by myself though, Judge.

25 THE COURT: Okay.

1 MR. INSELBUCH: It's to encourage people to do that
2 and relieve them of the problem that they would be confronted
3 with if the negotiations failed of then having somebody come on
4 the witness stand and say, he must be liable for this claim, or
5 the amount of this claim must be at least so and so amount
6 because that's what he offered me in the back room. But,
7 that's, as I said, not what we're doing here. We've filed lots
8 of briefs. Everybody's filed a lot of briefs which cited a lot
9 of cases. I will leave it to the Court to read the cases
10 should the Court find that necessary, but I think you'll find
11 that the cases fall into several groups.

12 First, there are a bunch of cases that simply say
13 what I just said, that the purpose of this rule is to encourage
14 settlement discussion so that when you get to litigating a
15 claim where settlement failed you can't use what people have
16 said in the discussions to prove the liability for or the
17 amount of the claim. That's a whole bunch of cases. They go
18 back into the 19th century.

19 There are a small handful of cases that deal with a
20 situation where it's not the claim but an identical claim
21 that's being discussed or litigated. For example --

22 THE COURT: Excuse me. Mr. Inselbuch, pardon me just
23 one minute.

24 MR. INSELBUCH: Sure.

25 THE COURT: I need to take a phone call. Excuse me.

1 Take about five minutes.

2 (Five minute recess)

3 THE COURT: ... for interrupting your argument. I
4 lost you with the cases that deal with the situation that talk
5 about it's not the claim.

6 MR. INSELBUCH: Sure. We were talking about how the
7 cases fall into groups. The first group merely says pretty
8 much what I said. It tells you what the rule says. It says it
9 applies to the case the people were negotiating. Then there
10 are some cases that deal with identical situations. I guess
11 the classic would be you have an automobile accident and you
12 have two people in one car and one person in the other car and
13 the one person is the defendant, the two plaintiffs sue. He
14 settles with one of the plaintiffs and the other plaintiff now
15 would like to use that settlement as an admission of liability.
16 And the courts probably won't allow them to do that either
17 because that's the identical claim and it would violate the
18 policy. He wouldn't be able to settle with anybody if you
19 permitted that in.

20 And there are a number of cases that say also what I
21 say about the rule that if you offer the material for a
22 different purpose than to show liability or the amount of the
23 claim in a particular case they'll let it in. For example,
24 there's this wonderful Hutsmith v. The Commission of Internal
25 Revenue case that's cited where the issue was the value of

1 timber taken from a particular forest. And there were two
2 taxpayers. They both took the timber from the same forest yet
3 the IRS had some expert estimator who came up with very
4 different numbers. And the different numbers were shown or
5 were admitted by the Court to show bias on the part of the
6 estimator. And that's of course exactly what I'm saying where
7 you're going to show some other purpose to be shown for the
8 evidence than the rules plainly permits it.

9 And, in fact, I think the Court recognizes once again
10 on December 5th that we were not -- this evidence was not being
11 offered for liability, but for some other purpose. At Page 41
12 and 42 of the transcript -- this is December 5th, 2006, Your
13 Honor. Mr. Bernick had been arguing that Rule 408 could not be
14 clearer. This applies to this without any question. The Court
15 said, "But I think the settlement history has a different
16 purpose regardless of liability. I don't take a settlement to,
17 especially one that says which most of the ones I've seen in
18 other cases if not this case say that there's no admission of
19 liability." And that's certainly the case, Your Honor.

20 "So I'm certainly not going to deem it to be an
21 admission of liability. But I think it does have some value
22 with respect to whether or not the debtor is willing to settle
23 claims, and if so at what levels for whatever purpose the
24 debtor chooses to settle those claims." My learned colleague
25 said, "But that is only -- that is not germane in this

1 proceeding." And the Court said, "Well, sure it is. From the
2 asbestos creditors committee side it is because the standard, I
3 think, is pretty clear that the Court has to look to what would
4 be the likely outcome of the claims in the tort system if no
5 bankruptcy had been filed."

6 Now, there is one case at least that is directly on
7 point. And that is Judge Brown's decision in the Babcock &
8 Wilcox case in New Orleans where Mr. Bernick and I were
9 adversaries once before. And Mr. Bernick made the same
10 argument there that 408 precluded the use of settlement history
11 to estimate the asbestos liability. Now, there we weren't
12 estimating for the purpose of a plan. It was a fraudulent
13 conveyance piece of the bankruptcy and we were estimating what
14 was the reasonable liability. The reasonable estimate of the
15 liability or not the liability of the amount of the asbestos
16 claims present and future as of a particular date when a
17 transfer was made. That's what we were doing. And we said
18 well, the way you look at that is the same way you look at it
19 in all these other cases. You look at what the history was and
20 you project it forward as of that date because you've got to
21 estimate the presence and the futures.

22 And Babcock & Wilcox through Mr. Bernick said no, you
23 can't do that, 408 precludes that. And Judge Brown said, and
24 this is a 274 Bankruptcy Reporter on Page 256. "Finally,
25 defendant's argument that 408 of the Federal Rules of Evidence

1 prevents the Court from considering B&W's prior settlement
2 history and protocol is also without merit. Rule 408 prohibits
3 use in trial of evidence of a settlement, 'To prove liability
4 for an invalid or invalidity of the claim or its amount;'
5 with a footnote. Rules 408 applies to the use of evidence of
6 compromise to prove the validity or invalidity of the claim
7 that is the subject of the compromise. And clearly here, the
8 claims that are the subject of this compromise are the closed
9 claims. We're not estimating those claims here today. They
10 have been resolved. Thus a particular plaintiff in a tort case
11 against a particular defendant cannot establish liability in
12 that case by using evidence of attempts to settle that case,
13 et cetera."

14 And what he went on to say is, "Consequently the
15 Court in determining whether B&W's future estimation of tort
16 liabilities was reasonable can consider both settlements by B&W
17 and other case histories against other asbestos defendants as
18 part of the grounds for its decision. To do otherwise would
19 close one's eyes to the realities that existed in 1998;" Judge
20 Brown. And, of course, we've had several estimations. We've
21 had Armstrong, Federal Mogul, Owens Corning Fiberboard before
22 Judges Fulham, Rodriguez and Robreno, all Third Circuit
23 District Judges, and they have all done it this way.

24 Mr. Bernick will say well, nobody argued about it.
25 Nobody raised 408. Well, maybe that's for the very good reason

1 that people did not perceive it to be a valid objection. But
2 in any event that's the way we did it. Finally, on 408 at the
3 end of its brief Grace argues that they should be permitted to
4 use some proof out of the settlement history, but the asbestos
5 creditors committee and the FCR should not be. And that's
6 really why we raise this immediately today before Mr.
7 Florence's testimony -- Dr. Florence's testimony.

8 Now, why do they want to do that? Well, they want to
9 value their estimate of what they call liability based upon the
10 settlement history. As it turns out as you'll hear based on
11 six mesothelioma settlements. And why do they want to do that?
12 Well, it makes the numbers much, much smaller, doesn't it, if
13 we do it based on a settlement history rather than on the
14 judgment history. If they based their estimate doing it their
15 way on the judgment history we wouldn't need to have these
16 hearings because the number would be so large and we would
17 agree to it.

18 But that case is interesting, because they cite you
19 to a place in the Federal Court, a Second Series at Page 912.
20 They cite you to Page 581 with a citation to the Second
21 Circuit. I would ask you to --

22 THE COURT: Wait, I'm sorry. I didn't get the cite.
23 I'm sorry.

24 MR. INSELBUCH: The citation is 912 F.2d, initial
25 Page is 563. The page that they cite to is 581 and they quote

1 at that page. And they cite it to the Second Circuit in 1990.
2 And I'd like the Court to open this book to Page 581. May I
3 hand it up?

4 THE COURT: Thank you.

5 MR. INSELBUCH: What you will see when you turn to
6 that page is the material that is cited to is not from the
7 Second Circuit, but from an appendix to the Second Circuit's
8 opinion which is a magistrate's decision which was ultimately
9 affirmed. And frankly in that case what the Magistrate had
10 before him was at the foot of a consent decree that the
11 American Society of Composers, Authors and Publishers has been
12 operating under for, I think, since 1940 is a rate making
13 process, licenses for the performance of musical compositions.
14 People who use lots of music want a blanket license to use that
15 music. And the dispute was with something called Show Time the
16 movie channel. And they wanted to show what a settlement offer
17 which had been made by ASCAP to license HBO had been to prove
18 what their license would be worth, or should have been or would
19 have been a fair thing evidentiary.

20 Now, the magistrate let that in, ironically, and then
21 decided it had no probative value. But in any event all I'm
22 saying is there are lots of cases that say well, for a
23 different purpose we can see it and that's what we're doing
24 here because it certainly wasn't there to show that HBO had
25 liability. But, I just would point out that I was struck by

1 the citation because it would lead one to believe that it was
2 language from the Second Circuit, which it is not.

3 Finally, in passing, we remark that even if there
4 were any validity to the argument about Rule 408, experts who
5 have historically done these processes in this way rely on the
6 evidence or the materials that they rely on irrespective of
7 whether the materials can come into evidence. That's the
8 learning of Rule 703. And since this is material that these
9 experts including Dr. Florence, when you hear from Dr. Florence
10 what he's done over the past 20 years in this field would rely
11 on in doing an estimate then they can rely on it irrespective
12 of whether it satisfies other rules of evidence.

13 Now, the argument is made that oh, you can't trump
14 408 with 703. Well, you're not trumping any rule with 703
15 because the fact that the expert can rely on it doesn't bring
16 it into evidence for purposes of 408. Now the Court has
17 authority under 703 to do whatever the Court feels is necessary
18 to make use of the material fair in the circumstances. But 703
19 is an entirely different approach to the issues that are in
20 question. And I would close by just arguing to the Court that
21 what is sauce for the goose is sauce for the gander. If we are
22 not to be permitted to show -- to use the enormous history of
23 how Grace went about resolving its disputes over personal
24 injury claims in the past to show how they would most likely
25 have come out in the future then for sure Grace cannot be

1 permitted to use the settlement values that come out of that
2 same pile of material for purpose of showing what they say is
3 their liability. Thank you.

4 THE COURT: Mr. Ansbro.

5 MR. ANSBRO: Thank you, Your Honor. I'll be brief.
6 I realize our side's time is short at this point. Your Honor,
7 I just would really rate from the perspective of the future
8 claimants' representative as Mr. Elihu Inselbuch has pointed
9 out we're not here in this estimation hearing to prove
10 liability. And in fact the FCR's estimation expert Jennifer
11 Bigg does not, contrary to Grace's arguments, use Grace's
12 settlement data to prove liability. Ms. Biggs, as you will
13 hear and have read in her expert report gives her best estimate
14 as to the anticipated liabilities that Grace would be expected
15 to face, that Grace would be expected to face in the tort
16 system.

17 Consistent with all of the prior precedent in
18 contested asbestos bankruptcies and asbestos estimations the
19 tort system is the basis upon which the estimation proceeds.
20 And so Ms. Biggs, by estimating the anticipated liabilities is
21 estimating the dollar amounts that Grace would be expected to
22 pay to claimants in order to monetize and resolve the pending
23 and future asbestos personal injury claims against it. It is
24 for that purpose that she uses the settlements here. She's not
25 proving liability. She doesn't assume legal fault or liability

1 by virtue of that information. Thank you, Your Honor.

2 THE COURT: All right. Thank you. Mr. Bernick.

3 MR. BERNICK: Yes, Your Honor. I'd like to begin
4 with what I think really is a central argument that's being
5 made here at the outset that's more or less a play on words
6 rather than a substantive analysis. Both the ACC and the FCR
7 have urged strenuously over time that the purpose of this
8 proceeding is not a "determination of liability." And that is
9 correct. We are not ruling or the Court is not being asked to
10 rule on the liability of Grace with respect to any individual
11 claimant. But, that's not to say that liability is irrelevant
12 to this proceeding. It is not to say that liability is not the
13 touchstone of this proceeding. It is.

14 This is an estimation of liability. It's not an
15 estimation of any other thing. It is an estimation of what
16 Grace's obligation to pay will be. An obligation to pay under
17 the rules comes down to allowability, and allowability is
18 determined on the basis of actual legal liability under state
19 law. So the touchstone of the estimation is in fact liability.
20 They can't get around it. This is something that we briefed in
21 the trial briefs that were submitted at the beginning of the
22 case, and it remains so today. It is their preference rather
23 than to estimate the liability by reference to actual facts of
24 liability to use the settlements as a proxy as they have done
25 in the past. That is their decision.

1 But then they have to wrestle with whether it
2 comports with the rules. If in fact the prior settlements are
3 not being used as evidence of liability then they are
4 irrelevant to the standard that brings us here today which is
5 allowability under the rules. If they are seeking to proffer
6 the prior settlement as settlements of liability therefore
7 their position is germane to the issue under the rules, then
8 they have to abide by Rule 408. It's just that simple. You
9 can't have settlements be introduced for purposes other than
10 liability still be found to be relevant or they're educed for
11 purposes of liability and not have to comply with Rule 408.
12 Rule 408 actually deals with the issue of liability. So,
13 that's the first problem is, is there something that because
14 this is an estimation takes this issue outside of Rule 408 and
15 the answer is no there is not.

16 We then come to two basic problems. Problem number
17 one is factual. And there's no amount of argument about the
18 law or indeed argument about Rule 408, or 702, or 703 or
19 anything else that can alter the facts. And the underlying
20 facts here are that the settlements that were reached by their
21 terms said that they were not admissions of liability and could
22 not be used for that purpose, and all of the parties to the
23 settlements so stipulated.

24 Now, on the basis of what principle of law can a fact
25 which doesn't exist be made to exist by virtue of any kind of

1 argument? There is absolutely no evidence before the Court
2 other than what we introduced in our brief, and we'd be happy
3 to give the Court summaries of all of the settlements that are
4 out there that we can lay our hands on if that's what the Court
5 wants. The only evidence before the Court is that the
6 settlements specifically disclaim admissions of liability.
7 Well, what principle of law now turns them factually into
8 admissions of liability? Absolutely none has been cited.

9 Now, we could agree that they are. In other cases
10 folks have agreed that they are. But, that is an agreement
11 that essentially is now a new agreement that changes the
12 historical fact. We've not made any such agreement. We're
13 prepared to have this historical fact the rest, or what it was
14 at the time, which is that it was not an admission of
15 liability. They have no answer to that proposition whatsoever.
16 It is an end of the matter.

17 To the extent that the Court gets into the rule all
18 that the rule constitutes is essentially a belt and suspenders
19 saying that now also as a matter of law if the prior
20 settlements in fact were admissions of liability as a matter of
21 law they cannot be introduced for that purpose. That's what
22 Rule 408 says. It executes a principle of legal public
23 policies that says that they're not admissible.

24 The only argument that is made with respect to the
25 rule in this application is Mr. Inselbuch ably put that box

1 around "the", the claim as if to say Rule 408 only governs the
2 disposition -- the evidence relating to the claim actually
3 litigated in the case which would have the effect of meaning
4 that it is only where negotiations between the parties in the
5 case at bar break down that Rule 408 then precludes the use of
6 those settlement negotiations in a subsequent trial on the
7 merit; that is to say, Rule 408 is really confined to
8 precluding offers of settlement and settlement negotiations as
9 opposed to completed settlements, because if there were
10 completed settlements the case wouldn't exist.

11 That interpretation of Rule 408 has been specifically
12 -- was specifically addressed by the advisory committee itself
13 in the 1970 proposed rules. In 1970 the advisory committee in
14 its notes specifically addressed that question and stated,
15 "While the rule is ordinarily phrased in terms of offers of
16 compromise it is apparent that a similar attitude must be taken
17 with respect to completed compromises when offered against a
18 party thereto. The latter situation will not of course
19 ordinarily occur except when a party to the present litigation
20 is compromised with a third person." Plain as day. That is
21 also the rule that was articulated and adopted by the Third
22 Circuit in the Petrusi case in 1993 where the Court
23 specifically held that prior anti-trust actions would not be
24 admissible, and that rule of law in the Third Circuit remained
25 sound.

1 Mr. Inselbuch, my learned colleague, cites the
2 Huntspeth case as if the Huntspeth case helps their position.
3 It does not. That's a Ninth Circuit case where Rule 408 was
4 held to bar third party compromises. The net result if the
5 rule were otherwise would be really the rule would have almost
6 no utility and particularly in toxic court cases where the same
7 defendant is present on multiple occasions and if the defendant
8 enters into a settlement with respect to one plaintiff that
9 settlement would then be used forever. And we know that that
10 doesn't happen. It doesn't even happen in asbestos cases. The
11 prior settlements are introduced as evidence of liability.

12 So there's no way that consistent with the language
13 and the rule or the policy of the rule, the rule can be read to
14 be so limited and so useless. There's a citation to Armstrong
15 and other cases. Mr. Inselbuch properly concedes that those
16 are cases that didn't raise the issue. In the Babcock case the
17 issue was raised, and I want to come back to the Babcock case
18 because it's instructive with respect to the second issue
19 that's before the Court which is the debtors' use of settlement
20 history.

21 In the Babcock case essentially the fact was whether
22 the settlement -- whether the estimate that had been made by
23 Babcock & Wilcox historically was a reasonable settlement or
24 not. That was the issue in the case. And while we did argue a
25 broader legal proposition, the Court in the very language that

1 Mr. Inselbuch cites came back to the proposition that the fact
2 at issue was a liability estimate where the debtor itself used
3 settlement. So if you wanted and had to resolve the question
4 of whether the debtor's estimate was reasonable you had to be
5 talking about the settlements. There was no way to avoid it.

6 And very, very importantly, and this is a fact that
7 Mr. Inselbuch didn't touch on, but Judge Brown was at pains in
8 his opinion and it actually rebounded to the benefit of the
9 claimants because otherwise they would have been stuck with
10 that opinion in connection with plan negotiations said that
11 when we get to things like estimation, i.e., we're here today
12 talking about estimates, the rules can be completely different.
13 So that's a fraudulent conveyance case. It doesn't really have
14 anything to do with why it is we're here today.

15 As to the idea that 702 and 703 somehow create a
16 carve-out from Rule 408, there is nothing and anything to do
17 with 702, 703 that somehow design to trump or create an
18 exception to Rule 408. And indeed they proceed on the basis of
19 completely different jurisprudential considerations. 408 is an
20 issue about whether certain evidence should be admissible
21 because to admit it would violate or create a problem with
22 legal public policy. Rule 702, 703 has nothing to do with it.
23 It has to do with the quality of reliability that must attach
24 to evidence before it can be used as a foundation for expert
25 opinion.

1 So I'd like to talk a little bit then about the
2 second part of this equation. And Mr. Inselbuch's citation to
3 the sauce for the goose, sauce for the gander rule is in
4 certain parts of the mid-Atlantic is referred to the saucy
5 rule. I don't know if there's a southern version for that. I
6 tried a case where everybody referred to it as the saucy rule.
7 But really the rule that we have to deal with here is not a
8 rule of sauce, it's a rule of swords and shields. And let me
9 get into the good stuff.

10 We have a settlement that took place between Grace as
11 a defendant and Plaintiff A in some prior litigation. The
12 policy -- Rule 408 is designed to give protection to the
13 participants in this process and it does so by saying that Rule
14 408 essentially creates a shield -- that's my little shield --
15 both for Grace and for the plaintiff in that case such that
16 whatever they do can't be used as admission. Now, here the
17 stipulations in the settlement is so stated. But that's the
18 policy of Rule 408.

19 We now move forward to the present case. Grace is
20 now present here and we have a bunch of folks who are here as
21 Claimants 1 through N. What is important about the people here
22 is that they don't participate in the sauce rule. The sauce
23 rule or the shield's rule protects those people who were
24 involved in an actual settlement that is being placed at issue
25 in an evidentiary way. These people, there are four things

1 that relate to them; (1) is that they were not parties to the
2 settlement, (2) is that they are not protected by the policy of
3 Rule 408. None of these people actually were involved in the
4 settlements at all. They are totally different parties. And
5 because they're different parties there's nothing about these
6 prior settlements which we are using for purposes of their
7 dollar value, there's nothing about their negotiations or their
8 interests in the negotiation process that is in any way, shape
9 or form compromised. They are not parties, they are not
10 protected by the policy, they were never involved.

11 And that is clear and that is also the force of the
12 Show Time decision out of the Second Circuit which was -- we do
13 cite the magistrate's opinion and the magistrate's opinion is
14 in fact appended to a Second Circuit decision that upholds the
15 determination that was reached.

16 But the process doesn't even start here -- stop here.
17 This is also not a situation where anybody wants to litigate
18 the settlements on the merits insofar as their dollar amount is
19 concerned. The claimants here aren't coming in and saying, oh,
20 we want to prove up that all of these -- all of our claims in
21 terms of their dollar value are really worth X dollars because
22 of, you know, compensatory loss, you know, emotional -- all of
23 the soft damages aspect of their claim. They're not seeking to
24 litigate on the merits.

25 The whole purpose of Rule 408 is to protect

1 litigation on the merits so that if either side to this
2 controversy wanted to actually litigate damages on the merits
3 and either party were a party to the prior determinations based
4 upon settlement, well, then Rule 408 would not allow you to
5 displace litigation on the merits with litigation which used
6 instead the settlement value. That's not taking place here.
7 There's no evidence that we will hear from the claimants here
8 with respect to the class of claims that we're dealing with
9 that says, oh, here's what their real value is based upon a
10 merits analysis.

11 And obviously this then brings us to the last
12 situation. This is not a situation where 408 is being used as
13 a shield. Everybody, everybody in this case agrees that the
14 dollar amounts assigned to the claims should be driven by
15 settlement history. In that respect this is exactly like the
16 Babcock case. In the Babcock case everybody agreed that the
17 issue was whether the estimate that had been reached by Babcock
18 was a reasonable estimate and it used settlement information.

19 Likewise with respect to dollars here that is the
20 claim value these are all situations on both sides, all the
21 parties here are saying we all agree that the settlement
22 history should be the benchmark. So we don't have anybody who
23 wants to litigate on the merits. Everybody wants to litigate
24 on the basis of the settlements. And what is it that the other
25 side now comes in and says? They come in and say well, we

1 really don't like what Grace is doing on the liability side.
2 We really don't like that. And even though we agree with what
3 they're doing on the damages side, we would rather toss out the
4 entire enterprise and wipe out all of Grace's evidence on
5 liability by saying oh, well, they can't use the damages part
6 of the equation. That's effectively what they're saying.

7 If we weren't going with our approach on liability;
8 that is, liability determined on the merits, they wouldn't be
9 making a peep about the use of the settlement dollars for
10 valuation purposes. It is only by way of reprisal that they
11 are here saying that we can't use the settlement dollars.

12 Well, one thing is quite clear which is that Rule 408
13 is not a sword. It is a shield. It is protective. These
14 people aren't entitled to protection, only Grace is. They are
15 certainly not entitled to use this as a sword by way of
16 creating a threat against Grace's damages case in order to
17 obtain the result that they seek which is to throw out Grace's
18 liability case. This is a perversion of Rule 408. It's got
19 nothing to do with its protective policies, they don't enjoy
20 those policies. It's got nothing to do with their wanting to
21 litigate on the merits. They don't want to litigate on the
22 merits with respect to any issue in the case. This all has to
23 do with what they call the sauce rule, but it's really a sword
24 rule. And that rule cannot be found within the confines of
25 Rule 408.

1 THE COURT: Mr. Inselbuch.

2 MR. INSELBUCH: Mr. Bernick began by talking about
3 allowability of claims. And I would go back and remind the
4 Court that we're not here in an allowance proceeding. No claim
5 will come out of this estimation allowed. We couldn't begin to
6 allow future claims. We can't be allowing either Mr. A's claim
7 or Mr. B's claim because at least for the future claims we
8 don't even know who they are. And in fact if we were in that
9 mode, if we were actually going to litigate the legal liability
10 with respect to any of those claims, with all due respect to
11 this Court, we would have to be in the District Court because
12 every one of these claimants would be entitled to a jury trial.

13 I'm puzzled by what Mr. Bernick was writing over
14 there. I wonder whether he would also argue that if you had
15 another litigant, if they were not in bankruptcy, if they were
16 in the tort system and they had all of this pile of settlements
17 in the past and some new litigant came in to try a case against
18 Grace that litigant isn't entitled apparently to the policies
19 of 408. That litigant didn't settle anything. That litigant
20 wasn't party to the settlement. Could they offer the
21 settlement values from other cases against that litigant? I
22 think not. I think it wouldn't be probative.

23 We're not here saying that they can't use settlement
24 values because they're using a merits based argument. We're
25 saying simply that if all of that information that resides in

1 that history which we submit is the best evidence of what would
2 happen in the future with all of the unknown cases that might
3 arise in the future, if we can't use that then they shouldn't
4 be able to either, irrespective of what their theory is. The
5 rule is unitary. It doesn't talk about liability separately
6 from value. It talks about them together. You can't use one,
7 you can't use the other. You can use one, you can use both.
8 And we're not here to prove liability at all. They know that,
9 we know that. We're here to estimate what amount of money
10 needs to be set aside in order to properly fund the trust which
11 by definition we can't tell what the liability is. Thank you.

12 THE COURT: Mr. Ansbros.

13 MR. ANSBROS: Your Honor, if I may, maybe just inject
14 a different point of view here and perhaps put what Grace's --
15 put Grace's motion into context here. Your Honor is aware that
16 these two sides are presenting diametrically different
17 methodologies here. We're in the tort system. We're using the
18 term liability to couch costs of these settlements. Grace has
19 taken a completely different view. The motion -- and in that
20 context, Your Honor, as Mr. Inselbuch has pointed out Your
21 Honor has said that you will allow both sides to present their
22 cases fully and then Your Honor will take on board all of the
23 evidence that's presented and determine what's really going on
24 here. Is it liability according to Grace's theory or liability
25 according to the claimant's theory?

1 What this motion does is try to cut the legs out from
2 under the claimant's case altogether. If you were to grant
3 this motion we would essentially have no expert opinions to
4 offer to Your Honor. That would leave Your Honor with only one
5 choice, as to how to fund or to make an estimation that would
6 fund this trust. We submit, Your Honor, with left with only
7 one it would severely under trust -- under fund the trust.

8 A different way to look at this is if we had brought
9 a motion in limine, we've already brought these motions by way
10 of Daubert, but the same arguments could be made from our side
11 based upon the tort system; that is to say, we could have
12 brought motions in limine seeking to bar Dr. Anderson's
13 opinions about causation and about thresholds that she adopted
14 from Dr. Moolgavkar. None of the threshold and the criteria
15 applied by Grace's experts exist in the tort system. They
16 aren't the law. They are Grace's theory here in this case.

17 And Your Honor has allowed Grace to present its case
18 in full when a motion by us would have been grounded in tort
19 law which exists in 50 states to say what they are proposing
20 here isn't the law, it has no place, it's not a fit here.
21 That's our Daubert argument. This is nothing more than the
22 same thing they are doing by way of motion in limine. It's
23 inappropriate, Your Honor should hear both cases in full, make
24 a determination on that basis.

25 MR. BERNICK: Your Honor, I just have a very brief

1 comment which is that I literally am totally perplexed by the
2 argument that just got made. I think that I don't have
3 anything to say further in response to Mr. Inselbuch's
4 argument, but Mr. Ansbros just got up and said, geez, you know,
5 why don't you let everything come in and then consider these
6 matters. And we've stated our position, we've objected to
7 their evidence on the grounds of Rule 408. We did so in the
8 briefs that we filed at the outset. We didn't make the motions
9 before the Court here today.

10 The motion that was made before the Court here today,
11 as I read it, is by the ACC and the FCR. It was Mr. Ansbros and
12 his client and Mr. Inselbuch and his client that wanted Your
13 Honor to go forward and rule on these matters today presumably
14 with the view of cutting the legs out from under our case. So
15 we are content to have these matters, the 408 matter be before
16 the Court. We've made the -- we've stated our position both in
17 response to this motion but previously in the trial papers. We
18 will object to their use of settlement data. We are the only
19 ones who are entitled to do that. They are not entitled to do
20 that. We'll make that objection.

21 I expect that Your Honor will let all of that
22 evidence in and consider the matter at the end of the case. So
23 if the purpose in this was to simply say, oh, we object, well,
24 that's fine, but they didn't just do that. They moved in
25 limine to prevent our evidence from going forward. And it's

1 not just the ACC that did it, it's Mr. Austern and Mr. Ansbro
2 who did it, as well. So we're happy to have the arguments out
3 before the Court. We don't think it's even close. But we're
4 also happy to proceed with the case and have both sides put
5 their evidence in and then Your Honor make a determination at
6 the end of the day with the benefit of a full record about how
7 these rules are going to be applied.

8 THE COURT: All right. Well, I think consistent with
9 everything else that I've been doing I am going to allow the
10 evidence to go forward and make the determinations at the end
11 of the case. It appears to me that based on the theories that
12 both of you -- both sides are constructing and you're obviously
13 correct, Mr. Inselbuch, the ACC and FCR haven't started their
14 cases yet, and so what I know about the structure of the case
15 is what I've been able to read from the expert reports and the
16 arguments and opening statements and so forth. So I have some
17 conception of what you intend to do, but in terms of evidence
18 obviously I haven't heard it yet.

19 It does seem to me however that the settlement and
20 history construction both that the debtor intends to present
21 and that the ACC and FCR tend to present, although somewhat
22 different in scope, nonetheless are both relevant to your
23 respective cases. So in terms of relevance I think the
24 evidence is relevant. Whether it is admissible under Rule 408
25 certainly the other judges who have done estimations in the

1 Delaware cases have found it to be so, as did the original case
2 -- I think the original case anyway, one of the original cases,
3 Eagle Picher, that took a look at this issue.

4 Eagle Picher also, I think that's the appropriate
5 case, goes so far as to say that settlement histories with
6 respect to the non-debtor involved though are not relevant
7 unless there is some very good evidence that ties both the
8 product, the work history and so forth to the same type of
9 industry that the debtor itself was in. So there are some uses
10 of settlement histories that may or may not be appropriate
11 within the context of the given trial.

12 It's a little difficult sitting as a trial judge with
13 three District Court Judges who have looked at the same issue
14 in the same district having allowed this evidence to come in to
15 say that it's not admissible for the theory of the case that
16 the ACC and the FCR want to use it in. But, I'm not sure that
17 the Rule 408 issue was addressed by those courts. It may be
18 because no one thought that it was relevant. It may be because
19 no one challenged the use of the settlement histories for the
20 purposes for which they were being argued in that case -- those
21 cases; plural.

22 Nonetheless, for now I am going to let both sides
23 present it. I am going to decide at the end of the cases,
24 plural, what the relevance and admissibility of the evidence
25 will be because as I've said earlier I want to get the case

1 done, and I will take it all under advisement at the end. We
2 don't have a jury here and I think I can separate it all out
3 when I have an opportunity to consider it at the end.

4 MR. INSELBUCH: I have just a brief question. Do you
5 envision then that we would make, when necessary, brief
6 protective objections --

7 THE COURT: Yes. Please.

8 MR. INSELBUCH: Thank you.

9 THE COURT: Okay. Mr. Bernick.

10 MR. BERNICK: Do they have to be repeated? I mean,
11 virtually every question --

12 THE COURT: Just raise them the first time in the
13 record where they appear, and then just indicate that you've
14 got a continuing objection so that when I get to that point in
15 the record I know that that's where the objection comes up.

16 MR. INSELBUCH: Understood, Your Honor.

17 THE COURT: With respect to any witness for whom you
18 intend to raise the objection.

19 MR. INSELBUCH: Understood.

20 MR. BERNICK: Grace calls Dr. Tom Florence as its
21 next witness.

22 B. THOMAS FLORENCE, GRACE'S WITNESS, SWORN

23 COURT DEPUTY: Please be seated.

24 THE COURT: Mr. Inselbuch, is this your volume or is
25 it --

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1 MR. INSELBUCH: Yes, it is, Your Honor.

2 THE COURT: May I return it, please so I don't
3 forget.

4 MR. INSELBUCH: Thank you.

5 (Pause)

6 MR. BERNICK: May I proceed, Your Honor?

7 THE COURT: Yes.

8 MR. BERNICK: Has the witness been sworn?

9 THE COURT: Yes.

10 MR. BERNICK: Okay.

11 DIRECT EXAMINATION

12 BY MR. BERNICK:

13 Q Good morning, Dr. Florence. Could you please tell us how
14 long you've been doing claims estimation, roughly?

15 A I think that the first piece of work I did for claims
16 estimation was for the Ace Robbins Company, probably mid-80s.

17 Q Okay. Ace Robbins didn't involve asbestos, did it?

18 A It did not.

19 Q What was the nature of the litigation that gave rise to
20 that estimation process?

21 A Well, there was a couple. One is -- I think the very
22 first project I did for Robbins was they were still a solvent
23 defendant in the tort system and we were asked to estimate
24 liability as it related to contingent liability for their
25 financial statements. Subsequent to that Robbins filed for

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1 bankruptcy. And I also worked for Robbins in the bankruptcy
2 process.

3 Q Was the litigation -- the underlying litigation, was the
4 focus of it the Dalkon Shields claims?

5 A It was.

6 Q Yes. You may want to --

7 A IUD.

8 Q I'm getting a little bit of raspiness. You may want to --

9 A That may be my voice.

10 Q A fine voice, but I think you may be just a tad too close
11 to the microphone. Could you describe -- I want to get a
12 little bit more into the experience that you had with
13 estimations. But, could you describe your educational
14 background. At this point I'd like to show Exhibit 2302 for
15 demonstrative purposes.

16 A Yes. I have a Bachelor of Business Administration from
17 University of Kentucky. I have an MA and PhD from Michigan
18 State University.

19 Q Okay. And I see that you have recorded here the basic
20 periods of your professional experience, could you just go
21 through those and describe what it is that you did in those --
22 what those different entities are and what it is that they were
23 focused on?

24 A From 1970 -- roughly 1978 to 1994 I was a vice president
25 with RPC, Resource Planning Corporation. It was a research and

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1 consulting firm headquartered in Washington, DC. The work I
2 did there was primarily social research of some sort. Some
3 operations were -- some for the FTC for clients that were in
4 litigation, some for the federal government. In 1994 ARPC --
5 I'm sorry -- RPC was purchased by KPMG; Peat Marwick. I went
6 to KPMG as a principal. While at KPMG I was a principal with
7 the firm and also was the national director of their litigation
8 practice. The work there was primarily the same type of work
9 that I did at RPC. I was there for three years. When I left
10 KPMG, I went out and was one of the founding members of ARPC
11 which is a research and consulting firm. Since 1997 I've been
12 the president of ARPC.

13 Q Okay. You mentioned that you did -- were involved in
14 estimations relating to Dalkon Shields beginning in the
15 mid-1980s, could you tell us what, if any, other estimations
16 that you've done that are not focused on asbestos?

17 MR. BERNICK: And let's show 2303 for that purpose.

18 A Well, I mentioned the Dalkon Shields. We also did -- have
19 done estimates of the timing and the value of claims related to
20 breast implants. We did a study for the -- Judge Pointer in
21 the court for Baxter/3M class action, I believe it was.

22 THE COURT: Pardon me, doctor. Could you push the
23 microphone down below your mouth? I think that may help a
24 little. We're still getting the feedback. Try that.

25 THE WITNESS: Okay. Is that better?

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1 THE COURT: No.

2 THE WITNESS: Then maybe I have to raise my voice.

3 THE COURT: No. I think it's the microphone.

4 MR. BERNICK: Yeah. Though I have to say you're the
5 first one where we've had this problem. Go ahead.

6 THE COURT: I'm sorry. For Judge Pointer, would you
7 pick up again what you did with Judge Pointer, please?

8 A Yes. We were asked by the Court to estimate the value of
9 the claims related to implants produced by Bristol Baxter or 3M
10 Corporation. And the purpose of that I think the Court was
11 trying to determine the feasibility of a settlement proposal.

12 Q Okay. I see that we actually have what I'll generously
13 characterize as a typo on this line because non-asbestos does
14 include asbestos. Could you give us, with the exclusion of
15 that, and we'll submit a conforming slide, just give us a brief
16 overview of some of the other non-asbestos tort estimates that
17 you've done.

18 A We worked for the Special Master in Albuterol class action
19 case. We were asked to estimate the value and timing of the
20 claims in that Albuterol case.

21 Q Okay.

22 A In the TCE case we worked for the -- it was actually a
23 bankruptcy case involving Met-Coil. We were asked to estimate
24 the value of the claims that arose out of exposure to TCE. In
25 Love Canal we were hired by the -- we actually worked for the

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1 insurance carriers in attempting to estimate the volume and
2 value of environmental claims coming out of Love Canal. And in
3 the Pedicle Screw case we were asked to determine the
4 feasibility of conducting an estimate of the number of claims
5 arising out of the Pedicle Screw litigation.

6 Q Let's turn to asbestos. Have you or have you not been
7 involved in working with trusts whose focus has been to pay
8 claims relating to asbestos?

9 A I have.

10 Q Okay. In what capacities have you done work in connection
11 with asbestos trusts?

12 A Well, we've served as consultants to trusts on operational
13 issues. We've served as consultants to trusts on estimation
14 issues. And we've actually -- I've actually served as an
15 interim administrator in some of the trusts.

16 Q Okay. Just in order to move through these quickly, let's
17 show you 2304. Does this list the trusts with respect to which
18 you've acted as an executive director?

19 A Yeah. These are the trusts that I'm currently serving as
20 the executive director for.

21 Q Okay. Tell us whether or not estimates of liability,
22 claims estimates, I should say -- tell us whether claims
23 estimates have been done in connection with trust operations.

24 A Yes. Claims estimates are normally done in relation to
25 trust operations.

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1 Q I'm showing you 2305. Does this indicate estimates for
2 asbestos trusts that you've been involved in?

3 A It does. Yes.

4 Q Have you also been involved in doing estimates for
5 bankruptcy cases?

6 A I have.

7 Q I'm showing you 2306. Does this indicate retentions, and
8 then also within the retentions, bankruptcy cases where you
9 have testified regarding estimation?

10 A It does. The clients with a T are those where I
11 testified.

12 Q I'm showing you 2307 --

13 THE COURT: Wait. You're going too fast for me. I'm
14 sorry.

15 MR. BERNICK: That's all right.

16 (Pause)

17 THE COURT: Okay. Thank you.

18 MR. BERNICK: Thank you.

19 Q What about for companies that are not in bankruptcy, but
20 are still in the tort system? Tell the Court whether or not
21 you've done estimates of claims, asbestos claims, in connection
22 with companies that are still in the tort system?

23 A We have. I have.

24 Q I'm showing you 2307. Does, this indicate those companies
25 for whom you have done estimates while they are still in the

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1 tort system, including those that are confidential so that you
2 can't indicate them by name?

3 A Yeah, it does.

4 MR. BERNICK: Your Honor, we would proffer Dr.
5 Florence as an expert in claims estimation.

6 MR. FINCH: Voir dire, Your Honor?

7 THE COURT: Yes, sir.

8 MR. FINCH: May I approach the witness, Your Honor?

9 THE COURT: Yes, sir.

10 MR. BERNICK: How long is this going to be? I don't
11 want to stand up --

12 MR. FINCH: Five minutes, ten minutes, tops.

13 MR. BERNICK: Ten minutes? I'll sit down.

14 VOIR DIRE EXAMINATION

15 BY MR. FINCH:

16 Q Nathan Finch for the Asbestos Creditors' Committee. Dr.
17 Florence, we have met before, correct?

18 A Yes.

19 Q Many times?

20 A Yes.

21 Q You're not a doctor, medical doctor?

22 A I am not.

23 Q You're not an epidemiologist?

24 A I am not.

25 Q You are not a lawyer?

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1 A I am not.

2 Q You're not an industrial hygienist?

3 A I am not.

4 Q You are not an insurance claims adjuster?

5 A I am not.

6 Q You are not a statistician?

7 A I know statistics, but I don't have a formal degree out of
8 statistics.

9 Q I asked you in your deposition what is your field of
10 expertise, and what you told me was at this point you're a
11 liability estimator, or a forecaster, correct?

12 A I think -- yes. Most of the work I do is estimation work.

13 Q Could you turn in your book to what's behind Tab 2?

14 THE COURT: I'm sorry. I --

15 MR. FINCH: Sorry. May I -- sorry, Your Honor.
16 John, could you show on the screen ACC-462?

17 Q Dr. Florence, do you recognize ACC --

18 UNIDENTIFIED SPEAKER: Turn off the ELMO.

19 UNIDENTIFIED SPEAKER: You're going to switch?

20 UNIDENTIFIED SPEAKER: How did I know that?

21 UNIDENTIFIED SPEAKER: You're a quick study.

22 (Pause)

23 Q This is the second expert report you did in this case, Dr.
24 Florence?

25 A It appears to be. Yes.

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1 Q And the second report is -- was intended to replace the
2 first report, correct?

3 A It was.

4 Q Okay. Could you turn to the last text page, Page 24? And
5 this lists the things you are relying on for purposes of
6 forming your opinions in this case?

7 A Page 24?

8 Q Yes. In reaching the opinions and conclusions that are
9 set forth in this report, you list various things, items of
10 data, reports, articles, et cetera, do you see that?

11 A Yes.

12 Q Okay. So, the -- one of the things you're relying on for
13 your opinions is your knowledge of asbestos claims forecasting,
14 correct?

15 A Correct.

16 Q And you developed that knowledge in your work as
17 estimating -- in estimating asbestos claims, for example, in
18 the Babcock case, correct?

19 A I estimated claims in the Babcock case, correct.

20 Q And as part of that, that's how you developed your
21 knowledge and how to do it, you're relying on your past
22 experience in estimating claims for your work here, correct?

23 A I assume -- yes, some of my work is a function of
24 experience I've gained over the years.

25 Q And you gained that experience in the Armstrong case, for

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1 example?

2 MR. BERNICK: Your Honor, I object. What aspect of
3 his expertise does this go to? If he is getting into what it
4 is that he's done in this case, that's a different matter.
5 This is -- should be focused on his expertise --

6 MR. FINCH: Okay. Let me tie it up, Your Honor.

7 MR. BERNICK: I really want to know if there's --
8 maybe -- if there's an objection here?

9 THE COURT: I don't know. He said he'll tie it up.
10 Let's see.

11 Q Could you turn to Page 1 of your report? That report.
12 That report. And you say, in the second paragraph -- by "we"
13 you're referring to you, or the companies your work for,
14 correct, the companies that you've owned; ARPC or RPC?

15 A ARPC.

16 Q Okay. We have estimated current and future
17 asbestos-related health claims and liabilities in connection
18 with Babcock & Wilcox, 48 Insulations, Eagle Picher Industries,
19 and it goes on through a fairly long list, do you see that?

20 A I do.

21 Q Okay. And you're relying on the experience and knowledge
22 you've gained in doing those estimations, at least in part, for
23 your expertise, correct?

24 A Sure. I am what I am today, I guess, as a function of
25 what I've worked on. Correct.

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1 Q Okay. Now, in this particular estimation, you were given
2 a series of assumed criteria, correct, that's shown on Page 2
3 to your report --

4 MR. BERNICK: I object at this point, Your Honor. We
5 all know where this is going. This goes to cross examination
6 on what he actually did in this case. It does not go to his
7 qualifications. Indeed, all that counsel has done is to
8 establish and reiterate some of the very same qualifications
9 that I brought out in connection with my examination.

10 MR. FINCH: Your Honor, may I make -- the line of
11 questions is three more questions, and I have an objection to
12 the proffer.

13 Q Dr. Florence, is it correct that the assumptions shown on
14 the screen on Page 2, you have never applied those assumptions,
15 those specific assumptions, to any of the other estimates of
16 asbestos claims and costs that you've done before?

17 A These particular assumptions?

18 Q Yes.

19 A On some of these we have. For example, in doing trust
20 forecasts we would apply assumptions having to do with ILO and
21 PFT scores. I mean, those would be criteria that are part of
22 the trust criteria that would go into the estimation.

23 Q But these specific criteria, one of them would include the
24 -- for example, the worker has to personally mix or personally
25 install a Grace asbestos-containing product. You've never

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1 applied in any other case a criteria that the worker has to
2 personally mix and personally install a Grace product in order
3 to make your estimates, correct?

4 A Certainly not with regard to Grace, no.

5 Q And you certainly haven't applied a mix or install
6 criteria anywhere else either, have you?

7 A Well, mix or install would be a subset of criteria that
8 we've applied other places. Again, there are trusts that have
9 exposure requirements where mix and install would be one of the
10 factors that would qualify for the --

11 Q But they're not exclusive factors, correct?

12 A They would not be exclusive factors. Correct.

13 Q So, people could qualify if they even if they didn't mix
14 or install in the trusts for Owens-Corning, and Armstrong, and
15 USG, for example?

16 MR. BERNICK: Objection. Again, we have a
17 foundational issue.

18 THE COURT: That's sustained. This is going beyond
19 expertise --

20 MR. FINCH: Okay.

21 THE COURT: -- to the specifics of what he did here.

22 MR. FINCH: All right. Then, Your Honor, I will just
23 -- I'll object for -- to Dr. Florence's qualifications to do
24 the estimate that he did here on the ground that he is using a
25 set of criteria here that he has not -- well, actually -- does

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1 Mr. Mullady have any voir dire?

2 MR. MULLADY: One question.

3 MR. FINCH: Okay. I'll let Mr. Mullady have voir
4 dire, and then I'll make my --

5 THE COURT: Mr. Mullady?

6 VOIR DIRE EXAMINATION

7 BY MR. MULLADY:

8 Q Just one question, Dr. Florence, and I'll ask it from
9 here. I'm Ray Mullady. I represent the FCR. Good morning.

10 A Good morning.

11 Q Are you an actuary, sir?

12 A I am not.

13 Q Thank you, sir.

14 THE COURT: All right. Mr. Finch?

15 MR. FINCH: We object to Dr. Florence's
16 qualifications to do the estimate that he is doing here on the
17 grounds that he has not done an estimate applying these
18 criteria in toto anywhere else in his past experience.

19 MR. MULLADY: The FCR joins the objection.

20 THE COURT: All right. That's overruled. The
21 specific criteria used don't go to his qualifications to use
22 particular criteria. It may go to the weight to be attributed
23 to the valuation done, but it doesn't have anything to do with
24 his qualifications to address the issue. So, the objection is
25 overruled. Dr. Florence may -- is qualified to express an

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1 expert opinion in the area of claims estimation.

2 MR. BERNICK: Thank you, Your Honor.

3 CONTINUED DIRECT EXAMINATION

4 BY MR. BERNICK:

5 Q Dr. Florence, I want to create a little bit of groundwork
6 before we go to the Grace estimation specifically. And just
7 let me ask you this. Could you just describe in the most
8 general terms what the basic elements of estimation are?

9 A Well, normally they are -- can I address claims
10 estimation?

11 Q Sure. Yes. That's what I'm getting at.

12 A Normally estimation would involve looking at a set of
13 historical experiences, historical data, for example, and
14 organizing that data in a way that could be analyzed, and then
15 applying to that data a set of assumptions or criteria, and
16 I'll -- for the lack of a better term, I'll say assumptions,
17 and then, based on those assumptions, extending that data to
18 the estimation itself, so making a calculation which would
19 provide the estimation.

20 Q Okay. Is estimation of claims always done in exactly the
21 same way?

22 A I think the conventional approach, it's always done that
23 way. Right.

24 Q Okay. Done the way that you've just described?

25 A Correct.

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1 Q Okay. But getting beyond just the basic steps that you
2 outline, at the detail level is estimation always done in
3 exactly the same way?

4 A You mean the calculations themselves?

5 Q Yes. The assumptions that are used, the data that's
6 analyzed, and the calculations that are analyzed?

7 A Absolutely not.

8 MR. FINCH: Objection. Compound.

9 UNIDENTIFIED ATTORNEY: And leading.

10 MR. FINCH: And leading.

11 THE COURT: Well --

12 MR. BERNICK: You're --

13 THE COURT: -- it's not -- I think the witness was
14 asking for clarification. To the extent that it was clarifying
15 -- it may be leading, but it was clarifying, that's all right.
16 To the extent that it's compound, it is compound.

17 MR. BERNICK: I'll be happy to break it up and
18 proceed accordingly.

19 Q Tell us whether or not the estimations always work with
20 exactly the same kind of data?

21 A No, they don't.

22 Q Tell us whether or not the estimations work with exactly
23 the same assumptions.

24 A They don't.

25 Q Tell us whether or not the estimations work with exactly

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1 the same calculations of current and future claims.

2 A They don't.

3 Q Thank you. Let's talk about two particular types of
4 estimation that you've done in the past. I believe in
5 connection with your qualification questions that we just posed
6 to you, you said that you had done estimates for -- in
7 connection with trusts, do you recall that?

8 A I do.

9 Q And you also talked about doing estimates in connection
10 with companies that were still not in bankruptcy, they were
11 still in the tort system, do you recall that?

12 A I do.

13 Q I'd like to review a little bit about the elements that
14 characterize -- or the elements that characterize those
15 different types of estimation. If we can show 2310. Would
16 this demonstrative assist you -- I think we're going to have to
17 switch back to the PowerPoint, please -- would this
18 demonstrative assist you in explaining to the Court the basic
19 elements that are involved in estimation for funding trusts on
20 the one hand, and estimation of future tort system costs on the
21 other?

22 A Well, in the trust situation frequently you're faced with
23 -- starting with data, you're faced with historical claims
24 information. And that claims information would reflect the
25 nature of the claims, the details regarding those claims, the

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1 status of the claims, the outcome of the claims. So, there's
2 normally a database of some sort, usually electronic, that
3 characterizes the historical experience.

4 Q Let me stop you here. What is the basic purpose? Where
5 do you want to get to at the end of the day when you do the
6 estimation for trust funding purposes? What are you trying to
7 accomplish?

8 A You're actually trying to estimate the volume, the timing,
9 and the cost of current and future asbestos claims against the
10 trust.

11 Q And why is that important to the operation of the trust?

12 A Most trusts, or all trusts, I guess, have limited
13 resources. And normally the trustees are charged with
14 evaluating the liability of the trust against the assets of the
15 trust, and calculating a ratio to determine what percentage of
16 the liability that the trust has, do they have assets to
17 actually pay?

18 Q Okay.

19 A And so the normal focus of these forecasts for trusts is
20 to forecast the liability, compare that to the assets that the
21 trust has and determine what percentage of the liability or the
22 cost does the trust have the ability to pay.

23 Q Okay. So -- I interrupted you. You said you have a data
24 component, which is a claims history on your chart. You then
25 talk about a TDP. What is a TDP, and how is it relevant to

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1 estimating in connection with funding a trust?

2 A Well, TDP is -- stands for trust distribution procedures.
3 They are normally procedures that have been approved by the
4 Court. From the standpoint of a trust, we always look at them
5 as the bible, that this is the charter of the trust. And in
6 that TDP it establishes the criteria by which claims are to be
7 evaluated, how claims are to be filed, how claims are to be
8 valued, how claims are to be treated if there is a dispute over
9 the value of the claim. It really -- it's intended to cover
10 the entire gambit. But, the most important for estimation is
11 probably the claims evaluation criteria, and the valuation
12 criteria.

13 Q Okay. Now, you've got claims history. You then have the
14 TDP. If you have a trust, is the TDP, in a sense that it's a
15 bible, is it something that is handed down at the beginning of
16 the trust that you have to follow?

17 A It is.

18 Q Okay. So, what you said, if you've got the claims
19 history, and you've got the TDPs, how do you then get to the
20 point of actually working with pending claims and future
21 claims? How does that proceed?

22 A Well, pending claims, normally what you look at is how
23 many of the pending claims would be qualified under the
24 criteria that are specified in the TDP. That allows you then
25 to have a pretty good picture of both historical claims that

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1 have been evaluated and paid, as well as pending claims that
2 have not yet been evaluated and paid. It gives you a full
3 history of the claims history of the trust, so it basically
4 says these are the claims that have been paid. These are the
5 claims that met certain criteria. Then using that as a base,
6 under the assumption that there is a similarity between these
7 -- the patterns that we're looking at and the epidemiology, for
8 example, in asbestos, their forecasts are usually done using
9 that pending claim and closed claim group as a base to forecast
10 how many claims you're likely to get in the future.

11 Q Okay. And that's where you have -- on 2310, you bring to
12 bear an epidemiological model?

13 A Correct.

14 Q Okay. You've got both Peto and Nicholson. Are there two
15 different models that you deploy?

16 A There are two that we use. Right.

17 Q Okay. Now, I want to switch to talking about estimates
18 that are done of a company that's still in the tort system and
19 wants to know what its expected future costs are. Again, could
20 you go through, just in your own words, the basic sequence of,
21 or elements of the estimation process there? What's the same
22 and what's different?

23 A Sure. Well, the data are the same. In essence it's --
24 you're beginning with a history of the claims that were filed
25 and evaluated in the tort system, and the outcome of those

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1 evaluations. So, the first stage, although the data may be
2 different in terms of the specific data, what the -- generally
3 what -- the scope and what's included is probably the same for
4 tort system estimates and trust estimates.

5 Q Okay. Do you have TDPs, though, where the defendant is --
6 defendant doesn't have TDPs, I mean, it's the simple fact of
7 the matter, right?

8 A You don't. Correct.

9 Q Okay. So, what is it that's used in place of TDPs in
10 figuring out what the stream of payments is going to be? If
11 you don't have the bible, do you have something else in its
12 place?

13 A Well, you usually have a couple things. One is if the --
14 if it's a claim in the tort system, you may have the outcome of
15 the application of some criteria. In other words, the
16 defendant may use some criteria in evaluating the claim, either
17 evaluating its -- whether it's a compensable claim or not, or
18 its value. But, the defendant may use some criteria.
19 Sometimes you don't know those specific criteria, so really all
20 you're able to look at is, well, whatever those criteria are is
21 kind of a black box. What is the outcome of applying those
22 criteria? For example, what percentage of the claims might be
23 paid, and what percentage of the claims might be rejected for
24 payment?

25 The other thing you have, I think, that may be

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1 different with a tort system estimate is, at least in the ones
2 that we've done, occasionally there are assumptions that are
3 applicable to a particular forecast, or a particular
4 estimation. For example, when we first look at the claims
5 information from a tort defendant, we will look for patterns in
6 that information. And there may be questions that arise after
7 that analysis. We usually will go back to the defendant and
8 say, are there assumptions that we should apply in doing this
9 analysis, and making this estimate? For example, there have
10 been situations where we've been told to assume that because of
11 a particular agreement it's been negotiated by the defendant
12 and plaintiffs there will be no more cases from Region X, or
13 State Y, or because of some legislative impact there may be no
14 cases in the future from Jurisdiction D. So, there are those
15 kind of assumptions that may arise, and that's usually
16 something we do on the front end of the estimation, is to talk
17 to the defendant about those assumptions.

18 Q Okay. Do you still get to the point, then, of ultimately
19 framing that type of historical information and those
20 assumptions into an input to a model?

21 A We do -- we usually, much like I described with the trust,
22 we come up with a claims history that includes both pending and
23 closed claims, and use that as an indicant of what future
24 claims may look like, and lay that against an epidemiological
25 model of some sort.

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1 Q Mr. Finch got up and said, are you an expert as a lawyer?

2 Do you remember that?

3 A I do.

4 Q And your answer was no. And he also asked you were you an
5 expert as an epidemiologist. Do you remember that?

6 A I do.

7 Q And your answer there was no. And yet, I'll go to it,
8 when it comes to settlement practices, do you hold yourself out
9 as being an expert in how lawyers, for various reasons, reach
10 agreements with regard to settlements? Is that an area of your
11 expertise?

12 A No.

13 Q Are you an expert in how lawyers negotiate, based upon the
14 merits of claims, or legal issues surrounding those claimants?
15 Are you an expert in how lawyers negotiate TDPs?

16 A No.

17 Q Are you an expert when it comes to the epidemiology -- are
18 you an expert epidemiologist?

19 A No.

20 Q When it comes to all of these different features that are
21 inputs to the model, such as the TDPs, the settlement
22 practices, and the epidemiological models, do you actually
23 verify the merits of the epidemiology or the merits of the
24 settlement practices yourself?

25 A No, I don't.

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1 Q What -- how is it that they become incorporated into your
2 work?

3 A Well, use the tort system example I just gave you that --
4 we'll be talking about with the defense -- the defendant about
5 them, assumptions going forward. Frequently we will meet with
6 counsel for the defendant and say is there anything that we
7 should assume about cases in this particular jurisdiction or
8 with this particular criteria? We're not lawyers, but we'll
9 rely on their judgment as to what should be assumed going
10 forward.

11 Q Okay. Let's talk about the next slide, which is 2311. I
12 framed those -- I've put a big box around the drivers of
13 payment fashioned as an input in the models, and I've said
14 they're assumptions. Is that essentially what you've told us?

15 A Yes, they are. In a general sense they are assumptions,
16 correct.

17 Q Now, let me just ask you, you have said that you actually
18 go talk with people, and you've become familiar, and you've got
19 a lot of experience. Tell me whether or not these -- can you
20 just assume anything? You just make the wildest assumption
21 that's possibly -- for example, could a tort defendant come to
22 you and say, Dr. Florence, I want you to assume the claims will
23 drop to zero within five years? Is that an assumption that you
24 would find to be the kind of assumption that is customarily in
25 -- customary and reliable for an estimator in your field?

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1 A It would not be a customary assumption, no.

2 Q Okay. The kinds of assumptions that you've talked about
3 making in connection with future trust funding and future tort
4 system costs, tell the Court whether or not they are the kinds
5 of assumptions that are customary and are customarily used as
6 reliable for estimation purposes in connection with your field?

7 A I'm sorry. The assumptions I've been asked to make in
8 this --

9 Q With respect to so far, you know, trust funding, and
10 future tort system, we've boxed those as assumptions. Are
11 those assumptions that are customary -- are customarily found
12 to be reliable for estimation purposes by people who do
13 estimation such as yourself?

14 A Well, certainly the epidemiological assumptions are
15 customary, and are conventional. The way, as you've labeled it
16 here, fashioned as input the methods for doing that are
17 relative, conventional and customary. And then the claims data
18 are relative, conventional and customary. The criteria that
19 are applied are normally, in the ones that I have done, are
20 conventional and customary criteria, yes.

21 Q Okay. Are they the kind -- to say, though, when you say
22 that they're conventional, you say that they've been done
23 previously; that is, TDPs and settlement practices, right?

24 A Correct.

25 Q Okay. Now, apart from whether they are common, are they

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1 the kind of -- and I'm asking this really for -- in a sense for
2 a legal reason, but it's still very important that you answer
3 it straight up based upon your expertise. Are they the kinds
4 of drivers, are they the kinds of assumptions that are the type
5 that are found to be reliable for estimation purposes by people
6 in your field? I'm not simply asking whether you do them all
7 the time, but whether they are the type -- the kind that are
8 found to be reliable?

9 A Yes, they are.

10 Q Okay. And I want to talk about this case, and I want to
11 talk about -- take you to Slide 2312. Would 2312 help you
12 explain, in a sense, the corresponding elements of the
13 estimations done here?

14 A Yes.

15 Q Okay. If you could just go through those with the Court,
16 and then we'll go back over and ask you a few questions.

17 A Well, in terms of the data, we began with data that was
18 supplied by the -- by Grace, having to do with its claims
19 history.

20 Q Okay.

21 A And those were data that conventionally -- they were very
22 conventional. They looked like the same type of data we had
23 gotten from other defendants with regard to the claims that had
24 been filed and the disposition of those claims, and the details
25 about the claims. In addition to the claims history, we had

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1 information about -- from the personal injury questionnaire in
2 the bankruptcy case, this bankruptcy case, which was
3 information that was related to primarily the pending claims,
4 those claims that were pending at time of bankruptcy. So, that
5 provided additional information to the information that we had
6 from the company.

7 Q Well, of course we know that the PIQ has not been used in
8 any other case, at least to your knowledge?

9 A To my knowledge it has not. Right.

10 Q What if we go beyond asbestos, are there cases in which
11 questionnaires, including detailed questionnaires, have been
12 used to gather data for estimation purposes outside of
13 asbestos?

14 A In the Dalkon Shield case that I referred to there was a
15 proof of claim form that was quite extensive that sought to
16 gather additional information beyond what the company had.

17 Q Okay. The next step, you talk about drivers of payment.
18 What were the nature of the criteria, what kinds of criteria
19 were supplied to you in the case of the Grace estimation?

20 A Well, we were supplied with information about the bar
21 date, and the filing of POC proofs of claim form by the bar
22 date, who filed that information, when it was filed. We were
23 supplied with information -- with certain criteria on which to
24 evaluate the claims. Those criteria covered both the exposure
25 and medical evaluation of claims.

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1 Q Let me stop you there. With respect to those kind of
2 criteria, that is dose criteria -- or exposure criteria, and
3 diagnostic or medical criteria, apart from the details of the
4 criteria, are the TDPs, and indeed, settlement practices, did
5 they often include exposure and medical criteria, as well?

6 A Correct. The TDPs normally include exposure and medical
7 criteria.

8 Q Okay. Claims data, what's -- in terms of requirements for
9 payment, when you say that those dealt in part with claims
10 data, what did that mean?

11 A Well, what we now have as a result of the data that we --
12 I discussed earlier, we now have information about whether the
13 claimant, in effect, meets criteria that we were provided,
14 gives us an opportunity to analyze whether claims can meet
15 those criteria or not.

16 Q Okay. We also have, again, fashioned -- let me just kind
17 of try to cut to the chase -- having looked for the drivers of
18 payment, do you, in this case, have, in a sense, a parallel
19 process for translating that into inputs to a model?

20 A Yes.

21 Q Okay. Now, all the things that we've talked about, let's
22 show 2313, I've got down 2313. I've got those marked as
23 assumptions. In this case, too, have you regarded these as
24 assumptions, or have you made some effort independently to
25 verify the accuracy -- or I should say the merit of the

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1 criteria that you've applied?

2 A No. I've accepted these as assumptions.

3 Q Now, we know that in this case, as Mr. Finch brought out,
4 that the particular requirements for payment and the particular
5 data haven't been used in connection with prior asbestos
6 estimations, would you agree with that?

7 A I would.

8 Q Okay. And so, if we talk about what is "traditional" for
9 asbestos cases, would you agree with what I think is Mr.
10 Finch's suggestion that they're not the traditional ones?

11 A Well, I think they are some of the criteria that are --
12 overlap what's -- what are "traditional" criteria, and there
13 are some that aren't.

14 Q Let me ask you, in connection with the Dalkon Shield case,
15 non-asbestos case, were exposure data and criteria considered
16 in connection with that estimate?

17 MR. FINCH: Objection. Relevance as to why a Dalkon
18 Shield IUD is relevant to an asbestos case?

19 MR. BERNICK: It's foundational.

20 THE COURT: All right. I'll accept it subject to it
21 connecting up.

22 MR. BERNICK: I'll connect it up in just a moment.

23 THE COURT: All right.

24 A Well, exposure in the sense of -- in the case of the IUD,
25 exposure in the sense of use, was the device used, and was the

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1 claimant exposed in that sense.

2 Q What about diagnostic criteria and data, tell us whether
3 or not they were an input to the Dalkon Shield's estimation?

4 A They were. There were levels of diagnostic criteria that
5 functioned to place a claimant in a disease category, or that
6 also placed a claimant in the category of being compensable or
7 non-compensable.

8 Q Okay. Now, what I want to know then is in terms of
9 whether the kinds of criteria -- the kinds of criteria that you
10 are working with here as assumptions, are they the kinds of
11 criteria that estimators such as yourself find to be and
12 consider to be reliable for estimation purposes?

13 MR. FINCH: Objection. Vague, over-broad.

14 THE COURT: I'm sorry. I apologize, but I didn't get
15 the question. Could you repeat it?

16 MR. BERNICK: It's a very simple question, and I
17 think we answered it with respect to the prior two. I just
18 wanted to get it with respect to this one.

19 Q Tell us whether or not the criteria, the kinds of criteria
20 that were used here in this case, are those kinds of criteria
21 the kinds that are considered to be reliable for estimation
22 purposes by people within your field?

23 MR. FINCH: Objection. Over-broad.

24 THE COURT: All right. He's already answered that
25 question, I believe.

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1 MR. BERNICK: He answered it with respect to the
2 prior two. I just want to make sure that we got it with
3 respect to this one, as well.

4 THE COURT: It is very broad, though. I mean, you're
5 asking about all criteria.

6 MR. BERNICK: In this particular case.

7 THE COURT: Yes, but I'm not sure -- do we know what
8 all criteria are?

9 MR. BERNICK: Well, we're going to -- yes, that's
10 true. It's general. I'd like to take his answer and then
11 we'll go through them, specifically.

12 THE COURT: All right.

13 A By their nature these are the same types of criteria that
14 have been used in the other cases that I've discussed.

15 Q Thank you. Let's go through now and talk about the actual
16 flow of how this worked; that is, how the estimation worked.
17 And first of all, I want to get a point of reference in terms
18 of time frame. In order to get a baseline -- you've talked
19 about a baseline for purposes of the estimate in these
20 different cases -- in other to get a baseline, where did you go
21 in the Grace historical data to get a baseline analysis done?

22 A Well, we assumed that the -- the cutoff point was, in
23 essence, the time that Grace filed for bankruptcy.

24 Q Okay.

25 A And therefore, our history would be that period prior to

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1 the bankruptcy filing.

2 Q Okay. Showing you 2314. Does this demonstrative focus on
3 the baseline as of April 2001 when Grace filed, and then the
4 use of that baseline for purposes of projection going forward?

5 A Yes. We were -- in essence what we're focusing on here is
6 to determine of the pending claims, whether those claims meet
7 criteria or not.

8 Q Okay.

9 A And then using those pending claims in combination with
10 Grace's other history to try to determine or try to estimate
11 what the number of future claims that would meet those
12 criteria.

13 Q Now, we're going to have a board here, 2301. Do we have a
14 broad board that kind of lays out the different steps that
15 were followed in connection with your estimation?

16 A We do, I guess.

17 Q Okay. What was the very first step? If you want to begin
18 with your baseline analysis, what was the first step of the
19 work, what first work was done?

20 A Well, after we had the claims data and had the claims
21 data, what I will call cleaned, or organized in a fashion that
22 would allow analysis, the first comparison was to determine
23 which of the cases were pending, which of the cases were not
24 pending, and then compare that to the cases for which we had
25 proofs of claim forms, POCs.

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1 Q So, POC analysis?

2 A Correct.

3 Q Okay. Who did the POC analysis?

4 A Well, we did the analysis. It was the comparison of the
5 records that were filed for -- the proofs of claim that were
6 filed with the historical records.

7 Q Okay. Showing you 2315, would this assist you in
8 describing to the Court the process that you followed in
9 determining what claims that were pending as of the time the
10 bankruptcy was filed also were the subject in a proof of claim?

11 A Sure. Yes, it would help.

12 Q Could you just use that to explain the process?

13 A We began this process with about 112,000 pending claims.
14 Those were claims that were pending at the time the company
15 filed for bankruptcy in April of '01. We then had a computer
16 file, or a listing of those claims that were non-settled proofs
17 of claim. They were claims -- proofs of claim that were filed
18 by claimants that had not settled with Grace. So, our first
19 step was to match the pending claims with those POCs to
20 determine which of the pending claimants actually filed a proof
21 of claim form.

22 Q Okay. And what was the final result; that is, how many
23 matches were found?

24 A Of the 112,000 there were roughly 84,000 that matched --
25 that had a POC -- that filed a POC.

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1 Q Now, tell us whether or not the degree of match, or the
2 kind of match was the same in all cases. Is that unclear?

3 A I -- I'm not sure I --

4 MR. FINCH: Objection. Form.

5 A I'm not sure I understand the question.

6 Q Well, tell us whether the tests that -- tell us what tests
7 were used in connection with determining whether there was a
8 match or not.

9 A Oh. Well, the exercise of trying to match claims was a
10 pretty extensive exercise. First we tend to try to match
11 claims based on the name of the claimant, the social security
12 number, allowing for the possibility that there might have been
13 data entry errors by the firm that received the proofs of
14 claim, or there might have been data entry errors in the
15 historical database. Various combinations were used to try to
16 -- combinations of information were used to try to match
17 claimants, primarily name, social security number, law firm in
18 some instances. Any data we could obtain that would allow us
19 to identify this pending claimant, this is their POC.

20 Q Okay. Were all the matches that you ended up with the
21 same in terms of what the basis for the match was?

22 A They weren't. There were some that were very clear
23 matches. Thomas Florence with the last four digits of the
24 Social Security Number 2140, those were easy matches. Those
25 were definite matches. There were some that the name might be

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1 slightly different. For example, the E is dropped off
2 Florence, but the last four digits of the social security
3 number are the same, and the first part of the name is the
4 same. So, those are not perfect matches, but what we would
5 call probable matches.

6 And then there's a group of claims that I guess you
7 could label as -- they were less clear a match, but there was
8 enough information to suggest that the claim -- it was a
9 possible match. So, there were really -- there was a gradient
10 of matches from historical data to POC.

11 Q Now, does 2316 provide a summary of the number of matches
12 that fall into those different categories?

13 A It does.

14 Q Okay. Now, for purposes of the remainder of the analysis,
15 did you exclude any of the matches because they were only
16 probable?

17 A No.

18 Q For purposes of going forward in the analysis that you
19 did, did you exclude any matches because they were only
20 possible?

21 A Well, we -- when it came to doing some of the analyses, a
22 possible match could include a match where there is one person
23 that's in the pending data. For example, John Smith is in the
24 pending data. And there are three John Smiths with POCs. And
25 we can't distinguish which of those three -- we know there's a

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1 match, we think there's a match, but we can't distinguish which
2 of those three is the match. So, in some instances when we
3 were doing the basic analysis we would have to exclude the
4 possible matches. But when we wound up the analysis, when the
5 analysis was complete, we actually put those matches back in
6 and calculate the ultimate result, including possible matches.

7 Q Thank you. Now, on the basis of the matching, could you
8 -- did you also determine the kind of disease that each one of
9 those pending claimants had?

10 A We did.

11 Q Okay. Was it possible in all cases to simply go to the
12 POC or to the pending database, was it possible in all cases to
13 do that, and simply read off the disease?

14 A It was not. No.

15 Q Okay. Is that an uncommon problem in your field?

16 A Well, we don't normally have POC data, but it's not
17 uncommon for claims in the historic data to have either missing
18 or ambiguous statement of disease.

19 Q Okay. Showing you 2317, does this chart assist you in
20 explaining to the Court how it is that you took all of the
21 pending matched claims and placed them by disease?

22 A Yes. The actual process of doing that was a little more
23 complicated than the chart illustrates. We started with the
24 disease that was either specified on the -- in the historic
25 database, or on the POC, if there was one specified on the POC.

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1 Q That's from in the "known" column?

2 A That would be the known column.

3 Q Okay. And then there -- basically, the numbers that we
4 have there could tell you the number of people who are known to
5 have meso, lung cancer, and the like?

6 A Yes, but we also looked other places for -- to determine
7 whether it was known. So, we also looked at places such as
8 that if a person had filed a PIQ, a personal injury
9 questionnaire, we looked to see if there was a specification of
10 disease on there. We also went to the attachments. In some
11 instances attachments were provided on the personal injury
12 questionnaire. So, if the claimant -- if we still didn't have
13 a disease for a given claimant, we would look on the personal
14 injury questionnaire. If, at that point, we still couldn't
15 determine the disease for the claimant, we actually used the
16 Manville Trust database. It's a database of claims that have
17 been filed against the Manville Trust. And we tried to
18 determine could we tell that claimant's disease as it was filed
19 against the Manville Trust? That gave us a -- it actually gave
20 us the first column there. So, whatever we could determine
21 from those sources we considered known diseases.

22 Q Okay. What then, is the allocation of the unknowns, what
23 does that refer to?

24 A Well, that still left us with some claimants for which we
25 could not determine their disease. We couldn't determine from

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1 any of the sources I mentioned earlier. So, what we did was we
2 actually went back in Grace's history. We had all this
3 historic data from prior work we've done with Grace. And we
4 asked the question, well, what percentage of the claims that
5 were filed historically that began as unknown, where did they
6 end up? Did an unknown most likely end up as a mesothelioma
7 claim, or as a lung cancer claim, or as an other cancer claim?
8 So, we calculated what we call a transition matrix, which was
9 -- or a percentage of unknown claims and where they normally
10 end up once you know the disease. So, for that remaining group
11 of claims where we still didn't know the disease, we used
12 Grace's history for what percentage of unknown claims end up as
13 mesothelioma, lung cancer, other cancer, et cetera.

14 Q Is that methodology a methodology that was developed just
15 for purposes of this case?

16 A No. It's a methodology that we've used when the data are
17 available in a number of cases.

18 Q Thank you. Based upon that analysis, I take it in order
19 to get the total number that is known and allocated unknowns,
20 that's a matter of addition?

21 A It is.

22 Q Does 2317 accurately summarize the categories and the
23 numbers of claims in the categories of disease for the Grace
24 case that resulted from your analysis?

25 A It does. That's the -- and that should total, going back

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1 to the matching of pending claims with POCs, that should total
2 the 83,000, et cetera.

3 Q Mr. Inselbuch, my learned colleague, has a calculator, so
4 I'm sure that if that's not true I'll learn about it during the
5 course of cross examination. Do you want to turn to the next
6 page of the analysis? You told us before that you had criteria
7 that you looked at here, and I want to peel away this part of
8 the chart and ask you what kinds of criteria, just generally,
9 were then applied to the claims data, and who was involved in
10 it? And we'll go through them in more detail, but give the
11 Court an overview of --

12 MR. FINCH: Your Honor, I have to stand up so I can
13 see the --

14 THE COURT: Certainly. Yes.

15 Q It's the last thing in your chart. It's the last page.
16 You can see the whole thing all at once. It's 2301. Do you
17 have that there at the back?

18 UNIDENTIFIED ATTORNEY: The suspense is --

19 MR. BERNICK: 2301. Yes. Mullady wants to wait
20 until it's all done.

21 Q What kinds of criteria were used here, and who was
22 involved in applying -- developing and applying those criteria?

23 A Well, the criteria really fell into two basic categories:
24 They were either criteria that dealt with exposure or criteria
25 that dealt with the disease diagnosis.

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1 Q Okay. Now, the Court has heard from Dr. Anderson. Did
2 you actually develop any of the exposure and dose criteria, or
3 were you relying on Dr. Anderson?

4 A I relied on Dr. Anderson.

5 Q She also has told us that when she got to the end of her
6 chart she had people in her organization review the various
7 claims to determine whether they went into Category A or
8 Category C. Did you independently do that review, or did you
9 rely upon what Exponent had done?

10 A No, I relied on what Exponent did.

11 Q When it comes to diagnosis of disease, we heard from Dr.
12 Weill about the standards for B-reading and the PFT standards.
13 Did you do anything to verify the standards that were used for
14 B-reads and for PFTs, or again, did you rely upon those as
15 assumptions that you were taking from other experts?

16 A I relied on those from Dr. Weill.

17 Q The same thing with respect to Dr. Henry?

18 A Correct.

19 Q And in terms of analyzing the claims data in this area, we
20 have that that wasn't Exponent, but it was Celotex, does that
21 square with your own understanding?

22 A The -- yeah. The Celotex trust reviewed an attachment
23 sample, or a sample of attachments, and some closed claims, and
24 based on that review coded that information, and we relied on
25 Celotex's coding of that information.

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1 Q Okay. And then you're kind of in the -- I guess it's kind
2 of the hub of the wheel. Was it your job at ARPC to take all
3 these inputs and marry them into the model going forward?

4 A It was, to take that data and marry it into an overall
5 estimate.

6 Q Let's begin with the medical data, and in order to get to
7 the medical data or the medical criteria, could you tell us
8 whether or not the medical criteria were the same for each one
9 of the diseases, or were different?

10 A The medical criteria were different.

11 Q Okay. I want to go to a somewhat complicated chart --
12 but, Your Honor, it is necessary -- which is 2318, and ask you
13 whether this chart would assist you in describing how the
14 medical data were applied?

15 A It would. Yes.

16 Q You say that with kind of a wry smile. Let's start with
17 the kind of top line, first. Could you just describe, in your
18 own terms, what the basic medical criteria were for
19 mesothelioma? What did it take for a mesothelioma claim to
20 qualify as being a mesothelioma claim, medically?

21 A Well, with mesothelioma claims we began with the -- again,
22 with the claims that were pending and those claims that had a
23 proof of claim form filed and those claims that filed a
24 personal injury questionnaire. And the reason the personal
25 injury questionnaire was important is to determine what the

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1 disease claim was. So, in that instance if the claimant
2 specified either in the pending information, the POC, or the
3 personal information questionnaire, the personal injury
4 questionnaire, specified a diagnosis of mesothelioma, that
5 mesothelioma diagnosis was accepted and that yielded, of all
6 the pendings that filed a POC and had a POC with the necessary
7 statement of mesothelioma, tat was roughly 1596 claims.

8 Q Okay. So, basically if it said mesothelioma, if you had a
9 diagnosis, accepted at face value?

10 A Correct.

11 Q Okay. Now, just to be sure, so that we anticipate
12 potential confusion, I want to go back to the prior slide. I
13 hope it's the prior one. We saw that your knowns were 1972 and
14 your unknowns were 454, and the total number that you had
15 recorded was 2400. Why is that number different from the 1500
16 number that you just told us about?

17 A Because we had to look at the information regarding the
18 diagnosis, or the claim diagnosis on the personal injury
19 questionnaire. So, of the 2426, roughly 1596 had personal
20 injury questionnaires that we could analyze.

21 Q Okay. And do those questionnaires, then, enable you to
22 perform the rest of the screen? In order to get to exposure,
23 do you need to have that population, or can you work with the
24 broader population?

25 A I need to look at that population to determine whether, in

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1 fact, they have a mesothelioma allegation.

2 Q Okay. Now, let's go to the next category. Let's flip
3 back to 2318. And I want to ask about lung cancer now. And
4 the first question I want to ask about lung cancer is just not
5 how you got to the number at the end here, but just the
6 criteria -- the medical criteria themselves. For someone to
7 count as a lung cancer, what were the medical requirements?

8 A That the ILO had to be a 1/0 or greater, and reproducible.

9 Q Okay. So, the ILO is -- the Court has already heard about
10 this, but to refresh the Court, the ILO is a rating applied to
11 an X-ray?

12 A Correct.

13 A Okay. And it had to be 1/0 or greater, but then you say
14 it had to be replicated, what does replicated mean, as you
15 understood it?

16 A It has to be reproducible, or more than one reading of the
17 X-ray would come up with that reading.

18 Q Okay. Now, this says Henry. Could you tell us what, if
19 any, reliance was placed upon the Henry X-ray study about which
20 the Court has learned from Dr. Weill?

21 A Well, where we got information on the number of claims
22 that would meet that criteria were based on the Henry X-ray
23 study.

24 Q Okay. Now, it says here that you started with all pending
25 claims. You then looked to any kind of POC match, and then you

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1 got to a 312 number as being certified X-rays plus PIQ data.

2 Explain in your own words what this step was that worked from
3 the -- any POC match to then this particular set of parameters?

4 A Based on the sample that Dr. Henry took, which was a
5 sample of certified X-rays, non-meso X-rays, that were not
6 meso. If we look at those, that group of claims, the ones that
7 were lung cancer claims that had a certified X-ray were roughly
8 312 claims.

9 Q Okay. Now, you have the 312 going through the replication
10 process coming up with a 32 number. What did that mean, where
11 did you get the 32 number and replication?

12 A So, of those 312 claims that had a POC and were part of
13 the study and had lung cancer, or lung cancer claims, Dr. Henry
14 was able to replicate 32 of those 312.

15 Q Okay. Now, we have a line that comes down from the 312
16 and says that the 312 is then looked at to see whether each
17 existing ILO is greater than 1/0, and there are 175 of them.
18 Was that, again, a number that you relied upon Dr. Henry for?

19 A It was.

20 Q Okay. And what was the -- do you know -- can you tell the
21 Court what you understood to be the purpose of looking for
22 whether there was an existing ILO of greater than 1/0?

23 A We were really looking at did the claim rely on an
24 existing ILO, and was there an allegation that the claim relied
25 on an existing ILO of greater than -- greater than or equal to

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1 1/0. So, of that 312 claims there were roughly 175 where there
2 was that reliance, and that ILO did exist.

3 Q And then you looked to see whether those could be
4 replicated?

5 A I did.

6 Q And the 15 was what?

7 A Of that 175, 15 were replicable by Dr. Henry.

8 Q Okay. And then you have an 8.6 number. What does the 8.6
9 percent refer to?

10 A That's the 15 divided by 175, so of the people that had an
11 existing ILO of 1/0 or greater, 15 were found to be qualified,
12 or 8.6 percent.

13 Q Okay. Just to -- and we're going to come back, I know, to
14 this, so I'll -- in a little bit. We have people who say have
15 lung cancer and say it's due to asbestos, and say they're
16 relying on X-rays and an existing ILO. Let me ask you, did all
17 people who had a claim for lung cancer say that they were
18 relying on X-rays and an ILO?

19 A No.

20 Q I'll put them down as other evidence. Did all of the
21 people who said that they were relying on X-rays supply the
22 X-rays?

23 A No.

24 Q Were there people who didn't supply the X-rays, but
25 certified that they had been destroyed or lost?